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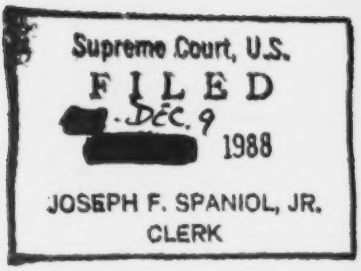

Case No. _____

IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

October Term, 1988

OSVALDO ALVAREZ,

Petitioner,

vs.

TRANS WORLD AIRLINES, INC. and
INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE WORKERS
DISTRICT LODGE 142,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OSVALDO ALVAREZ
c/o Bret Clark, Esquire
P.O. Box 53-1131
Miami Shores, Florida 33153
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QUESTIONS PRESENTED

1. May a union be held liable for breach of the duty of fair representation for failing to provide an attorney to represent an employee?

2. Did the trial court err in granting directed verdict in favor of a union and against an employee's claim for breach of the union's duty of fair representation where the court had previously denied a similar motion for summary judgment?

3. May a previous decision in favor of an employee on his claim to unemployment benefits have issue preclusion effect on a question of fact raised in a suit

brought in a federal court?

4. Did the district court err by ordering sequential trials of inconsistent claims and by refusing to submit a Title VII action to an advisory jury?

5. Did the district court err in this case by failing to exercise pendent party jurisdiction?

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REFERENCE TO OPINION BELOW

Alvarez v. Trans World Airlines, Inc. and International Association of Machinists and Aerospace Workers, District Lodge 142, Case No. 87-5379, unpublished opinion filed September 13, 1988 (11th Circuit 1988)

BASIS FOR JURISDICTION

This petition for writ of certiorari requests review of the judgment entered by the United States Court of Appeals for the Eleventh Circuit on September 13, 1988. No petition for rehearing has been filed. The Court therefore has jurisdiction pursuant to 28 U.S.C. section 1254(1).

TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, amendment V:

> No person shall be * * * deprived of life, liberty, or property, without due process of law.

Federal Rule of Civil Procedure 39(c):

> In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

STATEMENT OF THE CASE

Alvarez, a Cuban American, worked for nearly seventeen years as a ramp serviceperson, or baggage handler, for TWA. In early 1983 TWA attempted to fire Alvarez. The attempt failed, and Alvarez was reinstated to his posiiton with the company. Alvarez filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) against TWA over this discharge, claiming discrimination on the basis of national origin.

Three months thereafter, on Friday, May 13, 1983, Alvarez arrived at work and requested his paycheck. He was informed that his check was missing. In

the presence of Alvarez, a stop payment order for the missing check was issued and he was given a replacement draft. Alvarez then wrote down information pertaining to the missing paycheck, including the serial number on the check.

The following day Alvarez went to the airport branch of Barnett Bank of South Florida, N.A. (hereinafter "the bank"), where he prepared a statement, retained by the bank, stating that a check believed stolen was missing from the TWA payroll and should not be honored by the bank. Included in this statement was the information regarding the check, including the serial number, that Alvarez had written down the day before.

On June 8, 1983, a bank teller discovered the missing paycheck in the night depository, bearing a crude likeness of Alvarez' signature. The teller filled out a deposit slip, and attempted to deposit the funds into Alvarez' savings account.

After the check was returned due to the stop payment order, Alvarez was notified that his account was overdrawn. When he advised TWA about the incident, the company accused him of attempting to obtain two paychecks for the same pay period. The company thereupon terminated Alvarez effective August 4, 1983.

In accordance with the collective bargaining agreement, the union filed a grievance with the company over Alvarez'

discharge. On his own initative, and at his own expense, Alvarez prepared his defense to the accusations made against him, hiring a handwriting expert and assembling documents to prove his innocence. He repeatedly asked the union to provide him with the assistance of counsel. The union refused. TWA was represented by an attorney.

During the course of the grievance procedure the company distributed to the union several copies of a confidential letter, written by Alvarez, revealing that while employed at TWA he had been acting as an informant for the Federal Bureau of Investigations. In the past Alvarez had provided information to the Bureau regarding suspected acts of sabotage occurring within the airline by

union members and others.

At about this same time, Alvarez discovered a hand written note attached to his locker that said:

> They are goning (sic) to fire you Cuban bastard for ledron (sic).
>
> Yours Friends (sic)

"Ladron" is a Spanish term for thief.

While he was contesting his discharge, Alvarez also filed another charge of discrimination with the EEOC, this time alleging that the company had fired him in retaliation for his previous charge of discrimination.

He also filed a claim with the State of Florida for unemployment compensation. TWA contested his

eligibility for these benefits under a state law that prohibits a claim for unemployment compensation where an employee is discharged for misconduct. The hearing examiner found the allegation made by TWA against Alvarez to be false and awarded him unemployment benefits.

On August 9, 1984, Alvarez' case was finally brought before a System Board of Adjustment (hereinafter "SBA"), comprised of a representative of the company, a representative of the union, and an arbitrator. The night before the meeting, Alvarez met with union officials to discuss his case. The union official who was to represent Alvarez the next day confided to him that he did not know how to present his

case. He also refused to accept documents Alvarez offered to him to present on his behalf, including the favorable decision of the State of Florida regarding his unemployment compensation.

At the meeting the next day, Alvarez overheard the arbitrator tell a union official not to worry about the outcome of the grievance, since the arbitrator "owed one" to the union.

On August 13, 1984, the SBA denied the grievance. In an opinion authored by the arbitrator, the SBA concluded that the statement given by Alvarez to the bank three weeks before the stolen check appeared in the night depository was created by him after-the-fact, since the union presented no witness from the bank

to verify the authenticity of the document.

But the arbitrator then concluded that Alvarez had to have stolen the check, since the serial number of the check included by Alvarez in the statement given to the bank could only have been known by the person who stole the check, despite the fact that Alvarez had written this information down at the time the stop payment order was issued, and the fact that the arbitrator had already concluded that the statement was supposedly written after Alvarez had retrieved the stolen check from the bank.

A complaint was then filed against the company and the union on January 9, 1985, in the United States District

Court for the Southern District of Florida, for breach of the collective bargaining agreement in that Alvarez had been discharged without just cause, and for breach of the union's duty of fair representation. The suit also included a claim under 42 U.S.C. section 2000e (hereinafter "Title VII") for retaliation, a claim under 42 U.S.C. section 1985, and claims under state tort law.

The district court dismissed all of these claims except for the "hybrid" cause of action for breach of the collective bargaining agreement and the union's breach of the duty of fair representation, and the Title VII claim. The court denied Alvarez' motion to add the bank as a party to the action

for common law negligence, under the theory of pendent party jurisdiction. Thus, the basis for the court's subject matter jurisdiction over the remaining claims was 28 U.S.C sections 1331, 1343 and 1337.

Both defendants then filed motions for summary judgment, attaching extensive documentation and deposition transcripts in support of their motions. Alvarez in response argued that the evidence supported the conclusion that by failing to properly represent him in his grievance the union had breached its duty to fairly represent him. He also argued that there was sufficient circumstantial evidence for a finding that both parties had a motive to terminate Alvarez, and had entered into

at least a tacit understanding that he would not prevail in his grievance.

The district court denied the motions for summary judgment. In doing so the court said in an order entered on May 27, 1986 that:

> After careful consideration, this Court concludes that material issues of fact exist regarding the allegations that the Union breached its duty of fair representation of the Plaintiff and conspired with the Defendant, Transworld Airlines, Inc. ("TWA"), to terminate the Plaintiff's employment with TWA.

Trial of the case commenced on February 2, 1986. Alvarez' theory of the case was premised on the fact that he did not steal the check in question, a fact which became obvious to both parties upon even a cursory review of

the evidence. The issue then centered on the possible motives of the parties to have Alvarez terminated, and whether the deficencies in the union's handling of the grievance amounted to a breach of its duty of fair representation. Alvarez argued that the union and the company wanted him terminated because of his association with the F.B.I. As an alternative motive for the company, Alvarez argued that TWA retaliated against hîm for his EEOC complaints.

Because these issues were factual, and the theories inconsistent, Alvarez requested that the entire matter be heard by a jury in a single trial, with the jurors empaneled to hear the duty of fair representation claim sitting as an advisory jury for the issues relating to

the retaliatory discharge claim. Instead, the trial judge tried the duty of fair representation claim before a jury - and the Title VII seperately in a nonjury trial.

During the course of the trials, the trial judge ruled sua sponte on the grounds of relevancy that certain evidence pertaining to the underlying merits of Alvarez' discharge was inadmissible. This same evidence had been introduced by the defendants in support of their summary judgment motions.

The court also excluded the decision awarding Alvarez unemployment compensation, and refused to give that decision preclusive effect. The court did allow the introduction of some

evidence, however, of the union's refusal to provide Alvarez with an attorney. The union admitted in testimony that attorneys were assigned from time to time in other cases where employees were discharged by the company.

At the conclusion of the first trial, the judge directed verdict against Alvarez on his breach of the duty of fair representation claim. After the second trial, the judge granted TWA's motion to dismiss.

Alvarez appealed the subsequent judgment of the district court entered on April 20, 1987, to the United States Court of Appeals for the Eleventh Circuit. The judgment of the district court was affirmed and judgment entered

against Alvarez by the Court of Appeals on September 13, 1988. No petition for rehearing was filed.

Alvarez now seeks review of this judgment.

REASONS FOR GRANTING THE WRIT

This case presents important substantive and procedural issues concerning national labor law and national labor policy. In affirming the district court, the Court of Appeals decided issues of federal law which have not, but should be, settled by this Court, and decided others in a way contrary to applicable decisions of the Court:

1. Assistance of counsel. This Court has held that when Congress granted to

labor unions the power to act as the exclusive agent on behalf of all workers, thus subordinating the interests of the individual worker, a correlative duty was imposed upon unions to exercise that authority fairly. Vaca v. Sipes, 386 U.S. 171, 182, 87 S.Ct. 903 (1967). This duty of fair representation serves as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law. 386 U.S. 171, 182, 87 S.Ct. 903, 912.

This case presents the important question of whether a union can be held liable for breach of the duty of fair representation by failing to provide assistance of counsel to an employee.

discharged from employment. The Court has not as yet determined this issue.

The union in this case refused to provide Alvarez the assistance of an attorney to handle a matter where the union representative himself acknowledged a lack of proficency. Although the union provided attorneys to represent some discharged employees, it arbitarily and unreasonably refused to do so in the case of Alvarez.

Whether and under what circumstances a union must provide an employee the assistance of counsel is an important issue that should be resolved by this Court.

2. The directed verdict. In the recent case of Anderson v. Liberty

Lobby, Inc., 106 S.Ct. 2505, 2511 (1986) the Court reaffirmed the general rule that a trial judge may not direct a verdict unless reasonable minds could not differ as to the appropriate verdict in a given case. The Court held that this standard mirrors that imposed in ruling on a motion for summary judgment. Id.

Yet the trial judge in this case, after reviewing the evidence, denied the motions of both defendants for summary judgment, finding that there was a genuine issue of material fact "regarding the allegations that the Union breached its duty of fair representation of the Plaintiff and conspired with the Defendant, Transworld Airlines, Inc. ("TWA"), to terminate the

Plaintiff's employment with TWA."

Thus, there was sufficient evidence to submit the issue of the union's breach of the duty of fair representation to a jury in light of the reasonable inference that the union had either failed to fulfill its duty to Alvarez, or had mishandled his case in bad faith. The district court therefore erred by not applying the same standard used in denying the motion for summary judgment to the motion for directed verdict.

In affirming the district court's order directing verdict, the Court of Appeals therefore decided this question of federal law contrary to applicable decisions of this Court.

3. Issue preclusion. The Court held in University of Tennessee v. Elliott, 106 S.Ct. 3220, 3227 (1986), that federal courts must give preclusive effect to fact-finding of a state agency, as part of a federal common law of preclusion.

In this case an administrative agency ruled in favor of Alvarez on a crucial factual question, finding that he did not steal the paycheck in question. The district court refused to give this finding preclusive effect, and refused to allow the introduction of this evidence at trial.

By affirming this ruling of the lower court, the Court of Appeals again decided a question of federal law contrary to the applicable decisions of

this Court.

4. Advisory Jury. Federal Rule of Civil Procedure 39(c) allows a district court to try any issue with an advisory jury. In this case, the district court refused to try the entire case before a jury by submitting issues pertaining to Alvarez' Title VII claim to the already empaneled jurors as an advisory jury.

As a result, Alvarez was required to present in seperate trials two inconsistent theories to the court regarding the company's motive for wrongfully terminating him. This procedure deprived Alvarez of the right to a fair trial.

Whether refusing to submit issues in a Title VII case to an advisory jury and

ordering sequential trials in an action consisting of inconsistent theories violates a party's right to due process is an important question of federal law which the Court has not, but should, resolve.

5. Pendent party jurisdiction. Finally, this case presents the important issue of whether the district court erred in not applying the doctrine of pendent party jurisdiction over the bank for Alvarez' claim of common law negligence. The district court, rather than declining to exercise its discretion to assert jurisdiction of the claim, simply refused to add the bank as a party without applying the applicable test in deciding whether to assert pendent jurisdiction.

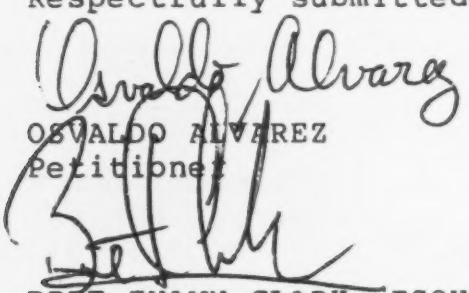
Although this Court has not expressly approved the doctrine of pendent party jurisdiction, the doctrine is recognized at least in the Eleventh Circuit. Lykins v. Pointer Incorporated, 725 F.2d 645 (11th Cir. 1984). The Court of Appeals in this case, however, affirmed the district court's refusal to apply the doctrine.

The Court should grant certiorari to resolve this previously undecided question of federal law.

Accordingly, Petitioner prays that the Court grant this Petition for Writ of Certiorari, vacate the judgment entered by the Court of Appeals, and remand this cause for a full trial on the merits.

Dated this 1st day of December, 1988.

Respectfully submitted,



OSVALDO ALVAREZ
Petitioner

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-5379

D.C. Docket No. 85-53

OSVALDO ALVAREZ,

Plaintiff-Appellant,
versus

TRANS WORLD AIRLINES, INC. and
INTERNATIONAL ASSOCIATION OF MACHINISTS
& AEROSPACE WORKERS DISTRICT LODGE 142,

Defendants-Appellees.

Appeal from the United States
District Court for the Southern
District of Florida

(September 13, 1988)

Before KRAVITCH and EDMONDSON, Circuit Judges, and Hoffman*, Senior District Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

*Honorable Walter E. Hoffman, Senior U.S. District Judge for the Eastern Districtof Virginia, sitting by designation.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 85-0053-CIV-KEHOE

OSVALDO ALVAREZ,

Plaintiff,

v. FINDINGS OF FACT AND CONCLUSIONS OF LAW

TRANS WORLD AIRLINES, INC. and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 142,

Defendants.
_____/

THIS CAUSE came before the Court on February 2-6, 1987, for a sequential trial of Count I, Plaintiff's breach of duty of fair representation claim, which was tried before a jury,[1], Fed.R.Civ.P.) and of Count II, Plaintiff's Title VII retaliatory discharge claim, which was tried by the Court sitting without a

jury. After having heard testimony of the witnesses and received in evidence various exhibits, the Court hereby makes the following findings of fact and conclusions of law as to the Plaintiff's retaliatory discharge claim, pursuant to rule 52 of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

1. Plaintiff OSVALDO ALVAREZ was employed by TRANSWORLD AIRLINES, INC. ("TWA") as a ramp service employee from 1966 to August, 1983, when TWA discharged ALVAREZ for his violation of Rule 9 of the TWA General Rules of Conduct, which proscribes the knowing submission of "inaccurate and untruthful

information for on . . . a company record, report, or document."

2. Prior to TWA's August, 1983, discharge of Plaintiff ALVAREZ, TWA thoroughly investigated the matter of ALVAREZ's "missing paycheck." That investigation was conducted by TWA's security officer Jack Finning, who retained a handwriting expert, interviewed witnesses, and examined documents before recommending ALVAREZ's discharge. The check incident, which arose as a result of TWA's issuance of a substitute paycheck to Plaintiff, Plaintiff's submission of an affidavit of forgery, and the subsequent appearanec of the missing paycheck endorsed "O. Alvarez" at the Barnett Bank, airport branch, where ALVAREZ kept

an account, occurred in June and July, 1983. TWA's investigation thereof took approximately one month, and was concluded in late July, 1983. Investigating employee Finning was not aware of ALVAREZ's EEOC charge and testified that he did not know what the EEOC was.

3. At the time of his August, 1983, discharge, ALVAREZ was then a member of the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS ("IAM"), and the IAM, on behalf of ALVAREZ, pursuant to the IAM/TWA Collective Bargaining Agreement, grieved the discharge, which grievance culminated in final and binding arbitration before the Systen Board of Adjustment on August 9, 1984; the System

Board of Adjustment decision denied the grievance and upheld TWA's discharge of Plaintiff on August 13, 1984.

4. In February, 1983, six months prior to his August, 1983 discharge by TWA, Plaintiff ALVAREZ, a Cuban American, filed a Charge of Discrimination, Charge No. 046830530, with the Equal Employment Opportunity Commission ("EEOC"), charging that TWA discriminated against him on account of his national origin.[2] The EEOC charge was made by ALVAREZ on the eve of grievance proceedings arising out of an earlier termination of ALVAREZ by TWA for insubordination, tardiness, and absenteeism for leaving work without permission of his supervisor. That earlier February discharge was

sucessfully grieved by the IAM for ALVAREZ, and he was reinstated to work effective on March 24, 1983.

5. Charge No. 046830530 was subsequently dismissed by the EEOC, and a notice of right to sue letter was issued. ALVAREZ did not, however, file suit upon the claims therein made.

6. Meanwhile, on January 20, 1984, Plaintiff ALVAREZ filed charge of Discrimination No. 046840393 with the EEOC, charging that in discharging him, for the paycheck matter in August, 1983, TWA was retaliating for the earlier filed Charge No. 046830530. Like the earlier February, 1983, charge of discrimination, the January, 1984, charge was filed on the eve of one stage

of the grievance proceedings instituted on behalf of ALVAREZ by the IAM. The EEOC dismissed Charge No. Ø36840393 and issued its Notice of Right to sue letter thereon on December 26, 1984.

7. Defendant TWA's station mannager Rudy Harris testified that TWA discharged ALVAREZ in August, 1983, because of his submission of false statements to TWA concerning the missing paycheck, in violatyion of Rule 9 of TWA's General Rules of Conduct, and that ALVAREZ's EEOC charge was entirely unrelated to his discharge. TWA's security investigator likewise testified that he had no knowledge of ALVAREZ's EEOC charges at the time he conducted his investigation. This testimony was unrefuted. Plaintiff presented no

evidence of any direct discrimination and no credible evidence of any indirect acts of discrimination against him by TWA either on account of his national origin, on account of his pursuit of EEOC claims, or otherwise. ALVAREZ's own testimony on this claim was only that he personally believed his job performance was satisfactory, that he believed he did not take his paycheck or sign his name thereto[3], that ten years before, some unidentified person once called him a "Cuban bastard," and he believed his asserted association with or employment by the FBI had something to do with it.

8. Any of the foregoing findings of fact which may represent conclusions of law are hereby adopted as conclusions of

law.

CONCLUSIONS OF LAW

1. To establish a prima facie claim of retaliatory discharge under Title VII, 42 U.S.C. section 2000e-3(a), where, as here, there is no direct evidence of retaliation, a Plaintiff must establish his engagement in statutorily protected expression; an adverse employment action; and a causal link between the protected expression and the adverse employment decision. Doyal v. Marsh, 777 F.2d 1526, 1534 (11th Cir. 1985); Simmons v. Camden Board of Education, 757 F.2d 1187, 1189 (11th Cir. 1985), re'g en banc den., 767 F.2d 938 (11th Cir. 1985), cert. den.,

__ U.S. __, 106 S.Ct. 385 (1985); Walker v. Ford Motor Co., 684 F.2d 1355, 1359, n. 3 (11th Cir. 1982). Once a prima facie case of discrimination has been established, the Defendant must articulate a legitimate, non-discriminatory reason for the adverse employment action. Doyal v. Marsh, 777 F.2d at 1534. See Texas Department of Community Affairs v. Burdine, 450 U.S. 2487, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). Where a legitimate, non-discriminatory reason for the Defendant's action is shown, the Plaintiff must, thereafter, establish that the proffered reason was in fact pretextual. Simmons, 757 F.2d 1189.

2. In this instance, while the Court finds that Plaintiff engaged in

statutorily protected activities (filing of EEOC charges) and that Plaintiff's employer, TWA, discharged the Plaintiff, the Court finds that Plaintiff ALVAREZ has wholly failed to meet his initial burden as to the third ground and requirement: causal connection. Plaintiff Alvarez has not produced any credible evidence of any causal connection whatsoever between the EEOC charges filed by ALVAREZ and the discharge of ALVAREZ by TWA. Plaintiff ALVAREZ has not, therefore, carried his initial burden and has failed to establish a prima facie case.

3. Because, however, this Court heard the entire matter, witnesses having testified out of order, assuming arguendo Plaintiff ALVAREZ had in fact

established a prima facie case, this Court concludes further that Defendant TWA met its burden of articulating a non-discriminatory, legitimate reason for its discharge of Plaintiff ALVAREZ (ALVAREZ's violation of Company rules of conduct), a decision made by TWA only after conduct of a good faith investigation of the facts. The Court finds further that Plaintiff ALVAREZ presented absolutely no credible substantial evidence that Defendant TWA's articulated reason for its discharge of ALVAREZ was pretextual.

4. This Court further specifically finds that there has been no credible evidence of any sort that anyone--TWA (or Plaintiff's union, IAM)-- in any way discriminated against Plaintiff ALVAREZ

because of his national origin, his filing of EEOC charges, or his alleged association with the FBI.

5. Any of the foregoing conclusions of law which represent findings of fact are hereby adopted as findings of fact.

Thereupon, it is

ORDERED AND ADJUDGED that Defendant TWA's Motion for involuntary dismissal is GRANTED, and Defendants shall SUBMIT a proposed final judgment in accordance herewith within ten (10) days of the date of this Order. The Court further RESERVES JURISDICTION as to the issues of costs and attorney's fees.

DONE AND ORDERED in Chambers at Miami, Florida this 30th day of March,

1987.

(signed)

JAMES W. KEHOE
UNITED STATES DISTRICT JUDGE

---

1. This Court directed a verdict upon Count I in favor of Defendants IAM and TWA on February 5, 1987, in accordance with Rule 50(a

2. At trial, ALVAREZ made the additional charge that he believed TWA discriminated against him because of his asserted association with the FBI.

3. Plaintiff ALVAREZ testified variously that he did not know who took his paycheck, that he suspected a fellow employee took his check and that he, in fact, knew who took his check but could not reveal that knowledge during the trial. Plaintiff ALVAREZ earlier wrote a letter to TWA security officer Finning stating that he had consulted with a psychiatrist and hypnotist to put him in a trance to find out what happened to his check.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 85-0053-CIV-KEHOE

OSVALDO ALVAREZ,

Plaintiff,

v. ORDER DENYING SUMMARY JUDGMENT

TRANS WORLD AIRLINES, INC., et al.,

Defendants.
_____/

THIS MATTER arose upon the motion of the Defendant, International Association of Machinists and Aerospace Workers, District Lodge 142 ("IAM"), for summary judgment in its favor. After careful consideration, this Court concludes that material issues of fact exist regarding the allegations that the Union breached its duty of fair representation of the Plaintiff and

conspired with the Defendant, Transworld Airlines, Inc. ("TWA"), to terminate the Plaintiff's employment with TWA. Accordingly, it is

ORDERED AND ADJUDGED that the motion for summary judgment is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida this 27th day of May, 1986.

(signed)

JAMES W. KEHOE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 85-0053-CIV-KEHOE

OSVALDO ALVAREZ,

Plaintiff,

v.

ORDER DENYING MOTION
FOR SUMMARY JUDGMENT

TRANS WORLD AIRLINES, INC., et al.,

Defendants.
_____/

THIS MATTER arose upon the motion of the Defendant, Trans World Airlines, Inc. ("TWA"), for summary judgment against the Plaintiff, on the allegation of retaliatory discharge in Count II of the Amended Compalint, pursuant to Rule 56 of the Federal Rules of Civil Procedure. After careful consideration, it is hereby

ORDERED AND ADJUDGED that the

Motion for Summary Judgment is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida this 23rd day of September, 1986.

(signed)

JAMES W. KEHOE
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
JAN 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-984

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

OSVALDO ALVAREZ,

Petitioner,

v.

TRANS WORLD AIRLINES, INC., and INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, DISTRICT 142,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT IAM DISTRICT 142

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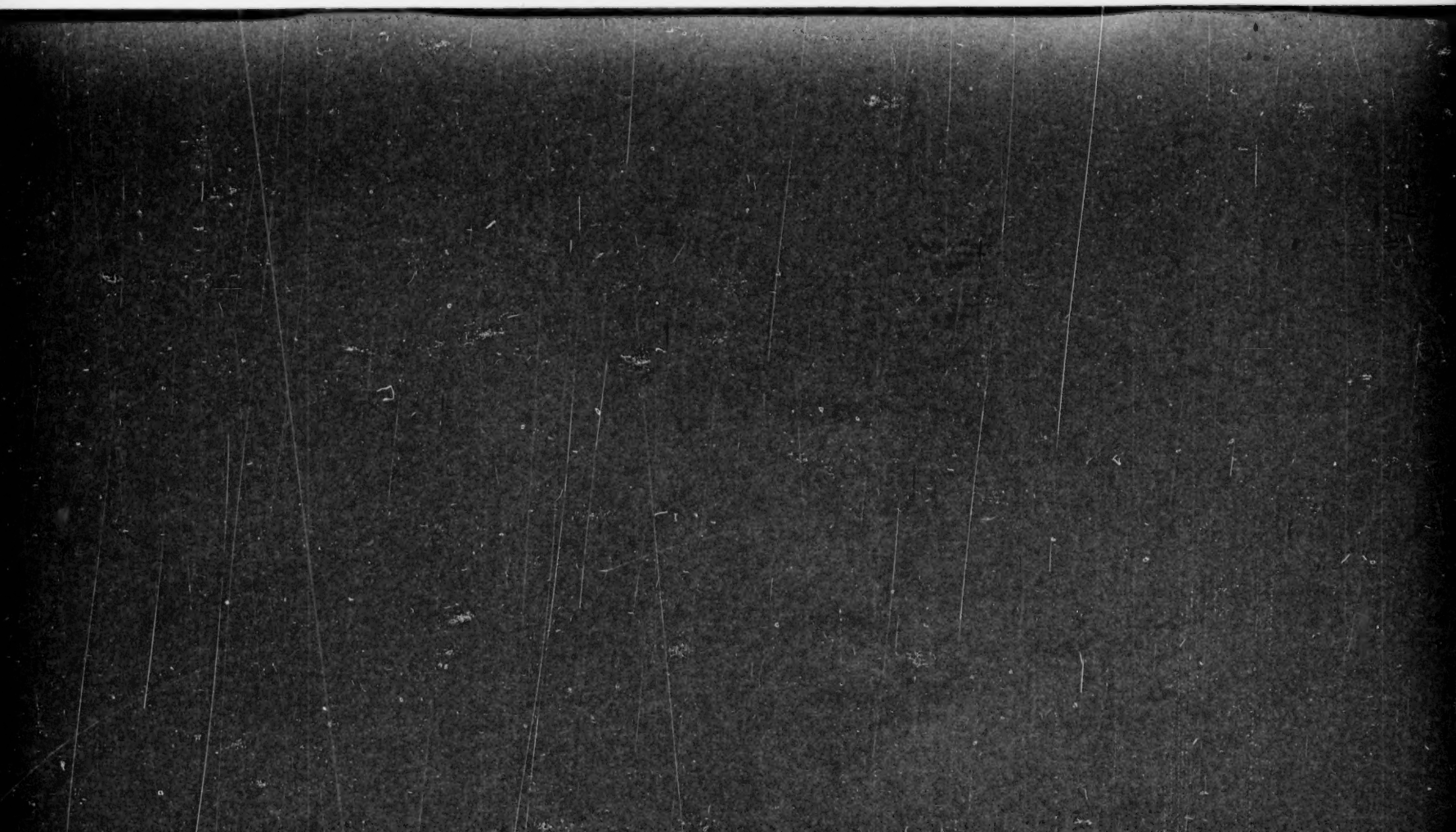

QUESTIONS PRESENTED

Of the five questions presented by Petitioner only the first two and possibly the third apply to Respondent Union. The remaining questions relate to issues solely involving Respondent TWA. Accordingly, we will restrict our comments to the first three issues tendered by Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

OSVALDO ALVAREZ,

Petitioner,

v.

TRANS WORLD AIRLINES, INC., and INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, DISTRICT 142,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT IAM DISTRICT 142

OPINION BELOW

Petitioner has failed to include the trial court's dismissal of the Respondent Union stated from the bench on February 5, 1987, and subsequently incorporated into an unreported written order dated February 26, 1987. Those opinions are recited *infra* under the heading "Procedural History Below" at pp. 8-11.

JURISDICTION

We accept Petitioner's statement of the basis for jurisdiction.

STATUTES INVOLVED

Although Petitioner does not mention it, the primary statute involved is the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, which creates the judicially implied duty of fair representation for unions acting as exclusive collective bargaining representatives of employees pursuant to *Steele v. Louisville & Nashville Ry*, 323 U.S. 192 (1944); *Tunstall v. Locomotive Firemen and Enginemen*, 323 U.S. 210 (1944); *Vaca v. Sipes*, 386 U.S. 171 (1967), and their progeny.

STATEMENT OF THE CASE

Substantive Facts [1]

Petitioner, Osvaldo Alvarez, began employment for TWA on February 16, 1966. Thereafter, he was represented by the Union and covered under its collective bargaining agreements. Prior to Alvarez's last discharge, the Union had successfully processed three grievances for him, two of them reversing attempted terminations for misconduct.

---

[1] Petitioner's factual statement is incomplete, misleading and improper. For example, (1) there is no evidence that the disputed check "[bore] a crude likeness of Alvarez's signature (p. 10); (2) there is no evidence "TWA was represented by an attorney" (p. 11) at the arbitration; (3) the note referenced at page 12 of Petitioner's brief was rejected as evidence by the trial court; (4) there is no evidence that "the arbitrator told a Union official not to worry about the outcome of the grievance since the arbitrator 'owed one' to the Union" (p. 14) or that it was obvious to the parties that Alvarez did not "steal the check in question" (p. 18). Also, Alvarez fails to note that there is no evidence supporting his theory that the Union purposefully lost his grievance and that his own testimony was:

> I have no evidence, definite proof. This is only what I think. All right? . . . I mentioned that I do not have definite proof . . . it is just my belief. I am in a free country. I believe what I want, right? I am not accusing anybody directly. I don't have the proof. I am going to a little conclusion.

Effective August 8, 1983, TWA discharged Alvarez because, TWA concluded, Alvarez had signed documents denying receipt of his paycheck which, in fact, he had reported missing but then had endorsed and deposited into his bank savings account after obtaining a replacement check from TWA. TWA claimed to prove Alvarez's endorsement through a professional document examiner, Andrew B. Herberer. The discharge followed on August 3, 1983, preliminary hearing before a TWA hearing officer at which the local union represented Alvarez (through Union steward Vincent Garcia) and presented Alvarez and his own handwriting expert, Edward Whittaker, to deny any wrongdoing. After Alvarez's termination, a grievance was filed and on August 22, 1983, District 142 (through General Chairman James McCloat) submitted it to Step 3 of the grievance procedure. After TWA denied the appeal, McCloat submitted the dispute to final and binding arbitration before the System Board of Adjustment which included David L. Beckman, a professional arbitrator, as chairman. Prior to the arbitration hearing, McCloat met with Alvarez, Garcia and professional document examiner Whittaker to prepare for the hearing. At an "all day" arbitration hearing on August 9, 1984, District 142, acting through McCloat, asked the Board to reinstate Alvarez with full seniority and backpay and to reimburse Alvarez's costs for Whittaker. District 142 called three witnesses—Alvarez, Whittaker and Garcia. Alvarez denied possessing, signing or depositing the check; he testified about everything he could remember from the day the disputed paycheck was found missing until the day he was fired. He also testified about his prior involvement with the FBI and his notion that he had been railroaded by some conspiracy.[2] Whittaker testified the signature on the disputed check was not made by Alvarez and Garcia supported Alvarez's

[2] Despite repeated requests from the arbitrator and both parties at the hearing, Alvarez refused to name anyone who had engaged in such a conspiracy although he claimed to know their identity.

testimony concerning the disputed check. McCloat cross-examined TWA's four witnesses, introduced exhibits, made objections, and presented opening and closing arguments. District 142 presented evidence on and argued the following points: (1) TWA did not have "just cause" for discharge; (2) TWA did not prove its allegations; (3) Alvarez was innocent until proven guilty; (4) TWA's case was circumstantial and TWA railroaded Alvarez; (5) there was no proof that Alvarez took the check or deposited it into his account; (6) TWA's rules had not been violated and there was no untruth in any document executed by Alvarez; and (7) the Union's expert established that Alvarez had not signed the disputed check and the testimony of TWA's expert to the contrary was not credible. At the conclusion of the hearing, Alvarez thanked McCloat for the Union's efforts.

In the Board's August 13, 1984 Opinion and Award (with the Union-appointed member dissenting), the arbitrator wrote a ten-page decision containing the issues, the position of the parties, the factual background and his opinion. In final analysis, the arbitrator did not give full weight to the Union expert's opinion because it was made without knowledge that Alvarez had injured his hand shortly before the disputed document was signed. Moreover, the arbitrator listed certain inconsistencies and damaging testimony by Alvarez which discredited him, including Alvarez's contention that there was "some giant conspiracy to get rid of him". For these reasons, the Board denied the grievance—a decision that was final and binding on the parties. At trial before the district court, Alvarez admitted he would have won the arbitration case if the System Board majority accepted either his testimony or Whittaker's opinion.

Procedural History Below

Alvarez filed his complaint on January 9, 1985, in seven counts, invoking jurisdiction under 29 U.S.C. § 185 (commonly known as "§ 301" of the National Labor Re-

lations Act, as amended). Only Counts I and VII related to District 142. Count I alleged (1) the Union breached its duty of fair representation in processing and arbitrating his termination grievance and (2) TWA breached the collective bargaining contract by discharging him without just cause. In Count VII Alvarez alleged Defendants had treated him negligently. Alvarez prayed for reinstatement, $10,000,000 damages plus court costs and attorney fees.

On February 13, 1985, District 142 filed a motion to dismiss for lack of jurisdiction under § 301. TWA joined the Union's arguments and also moved to dismiss the additional claims against it based on preemption and failure to state a claim. Alvarez received permission to amend his complaint by alleging jurisdiction under the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, by adding a Title VII count against TWA, and by including the Union in Count VI alleging "Civil Conspiracy". District 142 answered. On May 20, 1985, TWA moved to dismiss the amended complaint, claiming failure to state certain claims and preemption of others.

Meanwhile, on May 17, 1985, Alvarez filed a jury demand, and on May 23, 1985, District 142 opposed it.

On November 4, 1985, the trial court denied TWA's motion to dismiss Count I but granted its motion to dismiss Counts II through VIII. Specifically, the court dismissed Count II because that allegation (TWA "framed" Alvarez) had been submitted to arbitration by the Union and, accordingly, was beyond the court's jurisdiction. Counts III through VII were dismissed as preempted, and Count VIII was dismissed for failure to state a claim. The court retained jurisdiction over Count I involving District 142 to determine whether it breached its duty of fair representation by engaging in "arbitrary, discriminatory or . . . bad faith" conduct which "seriously undermines the integrity of the arbitral process" requir-

ing remand to arbitration before the System Board of Adjustment. The court stated that it intended to proceed only against the Union while retaining TWA as an indispensable party until the Union issues were resolved. On January 7, 1986, Alvarez asked for clarification of the court's dismissal of his Title VII claim against TWA.[3] TWA opposed Alvarez's clarification motion. On January 24, 1986, the court reinstated the Title VII claim against TWA originally contained in Count II. TWA answered the Title VII allegations and moved to strike Alvarez's claims for damages at law and demand for jury trial on Count II. This precipitated numerous filings, including a motion by TWA for summary judgment which the Court denied on September 23, 1986.

In the meantime, on December 26, 1985, invoking doctrine of pendent jurisdiction, Alvarez moved to join Barnett Bank, apparently for its alleged negligence in handling his account. No amended complaint was filed with the motion or subsequently tendered to the court. Both the Union and TWA opposed joinder.

On January 8, 1986, District 142 moved for summary judgment. Alvarez opposed it. On May 27, 1986, the court denied the Union's motion, finding, in relevant part, "that material issues of fact exist regarding the allegations that the Union breached its duty of fair representation . . . and conspired with Defendant TWA to terminate the Plaintiff's employment with TWA."[4]

---

[3] Petitioner's papers stated, "The gravaman of the complaint . . . is that TWA and the union conspired together to insure that Mr. Alvarez would lose his grievance because neither of those parties could tolerate a government informant in their midst." After hearing all the evidence, including Alvarez's own testimony (see footnote 1 *supra*), the trial judge found this allegation was a figment of Alvarez's imagination.

[4] During trial, the trial judge remarked to Union counsel, "Your problem is you have a judge who does not believe in summary judgment".

Prior to trial, Defendants filed separate motions in limine to exclude any reference (1) to the Florida Department of Labor and Employment Security regarding Alvarez's right to or receipt of unemployment compensation benefits; and/or (2) to the fact that the Union did not use an attorney to arbitrate Alvarez's grievance. Alvarez opposed the motions. On January 21, 1987, the court deferred its ruling until trial.

In the meantime, on January 16, 1987, the court issued an order striking Alvarez's claims for punitive damages against the Union. On January 20, 1987, TWA moved for clarification of its status under Count I, arguing that it should not be party to those allegations. On January 26, 1987, District 142 joined the request for clarification but contended that TWA should be party to the claim in Count I.

On January 30, 1987, TWA moved to separate and try sequentially the issues in Count I (then scheduled for jury trial) and Count II (then scheduled for court determination).

Trial commenced on February 2, 1987. The issues arising under Counts I and II were tried sequentially in part and simultaneously in part. The court referred Count I to a jury and ruled that, in relation to the issues raised in Count I, "TWA will remain and participate in full . . ." together with the Union, but that the court would decide Count II's Title VII allegations against TWA. Presentation of Count I before a jury occurred from February 2 to February 5, 1987. The court focused on the issue of whether the Union breached its duty of fair representation before the arbitration panel. The court allowed evidence about the Union's use of attorneys in arbitration. However, it disallowed evidence concerning Alvarez's state unemployment benefits. At the conclusion of Alvarez's evidence on Count I, in response to Defendants' Rule 50 motions, the trial court dismissed

any allegations of conspiracy or collusion between TWA and the Union, finding "I believe it is a figment of [Alvarez's] imagination. It will not be submitted to this jury". Then, after remarking that it "seems to me that it may be that as a matter of law [defendants] are correct", the trial court required Defendants to proceed with their evidence relating to Count I. Following their presentation, each Defendant renewed its Rule 50 motion to dismiss Count I. After hearing arguments and adjourning to review the evidence, the court granted the motions and dismissed the jury. It ruled: [5]

> THE COURT: Ladies and gentlemen, I have just scribbled out my reasoning and I will sort of ramble through it.
>
> As is reflected in the decision the government type of matter, United States Supreme Court and the Eleventh circuit have noted very simply the plaintiff's burden establishes breach of duty of fair representation. I think that it is absolutely mandated that we recognize that a union is allowed considerable latitude in the representation of an employee.
>
> Further recognize the grievance arbitration process is not conducted in a juducial forum, and that union representatives are not held to the strict standards of trial.
>
> The plaintiff must show the union's handling of the grievance was either arbitrary, discriminatory or in bad faith.
>
> As for example, when an arbitrarily or a mere tort or processes it in a perfunctory fashion.
>
> Holding of this Court, either bad faith or discriminatory, arbitrary perfunctory conduct for the union has been demonstrated by the plaintiff as an as a matter of law.
>
> This Court finds that such a conduct no reasonable jury would find by a prepondnerance of the evidence that the union's duty has been breached.

---

[5] The transcript contains many clerical errors but is quoted verbatim.

The Court further finds that although the plaintiff has alleged union hostility, that to award him by virtue of some nebulous action of the FBI informant has introduced no substantial evidence by way of testimony or documentation to substantiate the bearing of some hostile motive.

I feel that it is crucial to recognize the union has no duty to provide an employee with an attorney at a grievance proceeding. Certainly it is the Court's opinion that would indicate that any reasons existing why it was necessary to do so in this particular instance.

As I said, the union is allowed considerable latitude in its representation of employees, and are not held to the strict standards of trial actions.

Thus the failure to interview particular witnesses or to ask questions of company representatives at the hearing would deny not in itself constitute breach of the duty of fair representation. In light of the cases, mere negligence, inadvertance or errors in judgment are insufficient as a matter of law to establish a breach of duty of fair representation.

Moreover this Court finds there is absolutely no evidence that the union acted with reckless disregard to a employee's rights, or was grossly deficient in its conduct in representing him.

Accordingly, I have carefully gone over all of the evidence, listened carefully to the evidence, accordingly evidence in the light most favorable to the plaintiff, this Court finds that no reasonable jury could conclude that the union breached its duty of fair representation. The defendant's motion for a directed verdict will be granted.

Bring the jury in, Marshal.

(JURY PRESENT)

THE COURT: Ladies and gentlemen, I am sorry to have kept you waiting so long. At the conclusion of all the testimony, each of defendants filed what is known as a motion for directed verdict. That is, there is insufficient evidence to submit this case to a

jury. It is during this period of time that I have been carefully studying and reviewing the evidence, and the law involved in this case.

It is the judgment of this Court that as a matter of law the plaintiff has not proven substantial facts to submit this case to you. They have not established under the criteria set forth in the cases that the union in any way breached its duty of fair representation; therefore, the matter will be withdrawn from your consideration.

I have granted the defendant's motion for directed verdict and you will be discharged. . . . As I said, I have determined that as a matter of law it should not be submitted to you.

(JURY EXCUSED)

THE COURT: There is absolutely no evidence the plaintiff has afforded any proof to show any kinds of collusion upon the union, itself, with anyone or among more particularly with the airline, TWA.

* * * *

In addition to the finding, at the conclusion of all the testimony, I wanted to further state for the record that the plaintiff also failed totally to establish that the union acted with any arbitrary or bad faith conduct on the part of the union and absolutely no evidence of any substantial evidence of any fraud, deceitful action.

At this point, the Union excused itself from the trial on Count II's Title VII claim against TWA. On February 26, 1987, the court entered an order, stating "Pursuant to this Court's oral ruling in open Court upon defendants' motion for directed verdict at the concluion of plaintiff's jury trial, it is hereby ordered and adjudged that the motion is granted". On March 30, 1987, the court entered findings of fact and conclusions of law dismissing Count II against TWA which read, in part,

Alvarez's own testimony [was] . . . that he believed he did not take his paycheck or sign his name thereto

> [but he also] testified variously that he did not know who took his paycheck, that he suspected a fellow employee took his check and that he in fact, knew who took his check but could not reveal that knowledge during the trial. Plaintiff ALVAREZ earlier wrote a letter to TWA . . . stating that he had consulted with a psychiatrist and hypnotist to put him in a trance to find out what happened to his check.

Also on March 30, 1987, the court denied Alvarez's motion to add Barnett Bank as a defendant.

Alvarez appealed. On September 13, 1988, three Eleventh Circuit judges issued a one-word per curiam affirmance pursuant to its Rule 36-1. That rule allows for affirmance without opinion when the court determines that an opinion would have no precedential value and "(a) the judgment of the district court is based on findings of fact that are not clearly erroneous; . . . (d) . . . directed verdict . . . is supported by the record [or] (e) judgment has been entered without an error of law."

SUMMARY OF ARGUMENT

Petitioner offers no persuasive reason for this Court to grant its discretionary review. He shows no conflict in decisions of courts of appeals; indeed, certain issues he proposes have been uniformily and repeatedly decided against him in both appellate and district courts. He argues no error that will make any difference to the outcome of his case. He proffers no inconsistency between the decisions below and the opinions of this Court other than patent misreadings of inapposite decisions. He demonstrates no significance of any issue presented except his unexplained statement that they are important. In final analysis, this case lacks any colorable reason to justify the attention of this Court. The trial judge found no legal or factual basis for Petitioner's claims. Three judges of the Eleventh Circuit concluded that Petition-

er's allegations of error did not merit the dignity of a written opinion. The present petition, like the trial and appeal, is frivolous. This action never should have been filed. It never should have been tried. It never should have been appealed to the Eleventh Circuit. It certainly should not be accepted for *certiorari* by this Court. Once again, Petitioner's counsel has found the federal judicial system an enjoyable place to play. See comments of Chief Justice Berger in *Clark v. Florida*, Case 85-6004, 54 LW 3713 (April 28, 1986). Unfortunately, Respondents have been forced to pay for his frolic.

REASONS FOR DENYING THE WRIT

I. Courts Are Unanimous That A Union's Failure To Use An Attorney In An Arbitration Does Not Breach Its Duty Of Fair Representation

There is no precedent in any of the circuits that requires a union to use an attorney at an arbitration to satisfy its duty of fair representation. To the contrary, circuit courts unanimously hold the opposite. *Walden v. Teamsters Local 71*, 468 F.2d 196 (4th Cir. 1972); *Grovner v. Georgia Pacific Corp.*, 625 F.2d 1289 (5th Cir. 1980) ("The union did not provide appellant with a lawyer . . . but as a matter of law these facts will not support appellant's claim against the Union"); *Castelli v. Douglas Aircraft*, 752 F.2d 1480 (9th Cir. 1985) ("Where a union representative assists an employee at arbitration, the union's failure to provide the employee with an attorney is not a breach of the duty of fair representation"); also see, *Higdon v. Steelworkers*, 537 F.Supp. 653 (S.D. Ga., 1982), *aff.* 706 F.2d 1561 (11th Cir. 1983); *Brown v. TWA*, 746 F.2d 1354 (8th Cir. 1984); and *Curtis v. UTU*, 700 F.2d 457 (8th Cir. 1983). Federal district courts reach identical conclusions. *Ciaccio v. Eastern Airlines*, 354 F.Supp. 1272 (E.D.N.Y. 1973); *Schleper v. Ford Motor Co.*, —— F.Supp. ——, 107 LRRM 2500 (D. Minn. 1980); *Steed v. UPS*, 512 F.Supp. 1088 (S.D. W.Va. 1981); *McFarland v. Teamsters Local*

745, —— F.Supp. ——, 110 LRRM 3022 (N.D. Tex. 1982).[6]

Moreover, Petitioner gives absolutely no hint what an attorney could have done for him that was left undone by District 142 representative, McCloat. The facts are clear that the Union, at least, presented the substance of Petitioner's claim to the arbitration panel. The abstract legal principle of whether a union breaches its duty every time it loses an arbitration case in which it does not employ an attorney, is an idea whose time has not yet come. It certainly is not a question to be considered under the facts present here.

II. The Decision Below Is Correct Without Regard To The Question Raised By Petitioner Concerning The Propriety Of Directed Verdicts

Petitioner asserts that the trial court erred in granting the Union's motion for directed verdict at the end of all the evidence and that, because the trial court had

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[6] In the courts below, Petitioner relied on two cases, *Del Casal v. Eastern Airlines*, 634 F.2d 295 (5th Cir. 1981) and *Seymore v. Olin Corp.*, 666 F.2d 202 (5th Cir. 1982). Both are distinguishable from this case. In *Del Casal* the union refused to supply a grievant with a regularly employed staff attorney before a System Board of Arbitration, contrary to its established practice for union members, because he was not a union member. Accordingly, the court affirmed an award to Del Casal for the expense he incurred by retaining private counsel after that private counsel was successful before the arbitration panel. In the instant case, of course, Petitioner was not denied a union staff attorney (the union employs none); the union's use of attorneys was not dependent on Petitioner's status as a union member (Petitioner was a union member and, in fact, had previously served as a union steward); and, Petitioner was not successful at the arbitration. The court in *Seymore* found sufficient evidence to conclude that the union refused to process a grievance because the employee *consulted* a private attorney. *Seymore* did not involve a union's obligation to furnish an attorney at the arbitration hearing; indeed, it recognized that a union may "limit the participation of privately retained counsel in grievance proceedings."

denied the Union's motion for summary judgment prior to trial. Petitioner was entitled to have his claims decided only by a jury. Petitioner thus advances the peculiar idea that a Rule 50 directed verdict is automatically foreclosed whenever the moving party previously has been unsuccessful obtaining summary judgment on the merits prior to trial. Wright & Miller, *Federal Practice and Procedure: Civil* § 2531 ("... cases agree that a verdict may be directed . . . even though summary judgment has been denied"). On its face, Petitioner's contention is too obviously insubstantial to justify review.

In any event, since Petitioner's claim is predicated on his right to a jury trial—a right recently rejected in *Leach v. Pan American World Airways*, 842 F.2d 285 (11th Cir. 1988)—this Court is unlikely to reach the question rased by Petitioner because the trial court's disposition of Petitioner's claims against the Union was correct without regard to the issue. In short, if the cause were remanded to the trial court for decision, after *Leach*, the decision would be made by the trial court. Since, acting under its authority pursuant to Rule 41(b) the trial court certainly would reach the same conclusions it made when it withdrew the case from the jury's consideration, there is no need to consider the question raised by Petitioner in his second issue.

III. Petitioner's Preclusion Issue Rests On A Misreading Of *University Of Tennessee v. Elliott*

While we are uncertain about its relevance to his claim against the Union,[7] Petitioner's reading of *University of Tennessee v. Elliott*, 106 S.Ct. 3220 (1986), is

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[7] *Elliott* did not issue until almost two years after the Alvarez arbitration. Alvarez's unemployment claim was on appeal until September 14, 1984, more than a month after the System Board's August 13, 1984 decision. Moreover, the Union was not a party to Alvarez's unemployment proceedings. Finally, the rule recognized in arbitration generally and specifically before the IAM-TWA System Board of Adjustment is that unemployment decisions are not binding on arbitrators. See generally, Elkouri and Elkouri, *How Arbitration Works*, BNA, 4th Ed., 1985, p. 392.

wrong. That decision does not hold, as Petitioner asserts, "that federal courts must give preclusive effect to fact finding of a state agency, as part of a federal common law of preclusion". Rather, it requires that in actions arising under Reconstruction-era Civil Rights Acts, federal courts must give a state agency's findings the same preclusive effect they would receive in the state court if the state agency acted in a judicial capacity and resolved issues properly before it which the parties had an adequate opportunity to litigate; however, preclusive effect need not be given in federal litigation or under Title VII of the Civil Rights Act of 1964. In short, Petitioner seeks review based on Supreme Court law that does not exist. Moreover, *Elliott* has no possible reach to evidence in arbitration proceedings, to a union's duty to present a grievance or to any other matter remotely related to this case. Accordingly, Petitioner presents no reason for this Court to review the decisions below because of an improper application of federal preclusion principles.

CONCLUSION

This lawsuit is, and from its inception has been, a meritless exercise based upon insufficient facts and contrary to well-established law. Were it not for the extraordinary expense suffered by Respondents defending the frivolous claims repeatedly made by Petitioner and his counsel, the entire matter could be characterized as an unfunny joke. Petitioner raises no issue deserving review by this Court. *Certiorari* should be denied.

Respectfully submitted,

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No. 88-984

In The

Supreme Court of the United States

October Term, 1988

OSVALDO ALVAREZ,

Petitioner,

v.

TRANS WORLD AIRLINES, INC., and INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS DISTRICT LODGE 142,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT TWA'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW[1]

1. Does denial of a Motion for Summary Judgment by a trial court *ipso facto* require denial of a Motion for Directed Verdict after presentation of a Plaintiff's case-in-chief?

2. Does Federal Rule of Civil Procedure 39(c) require an advisory jury, when requested, on issues not triable by jury?

3. Must a federal district court exercise pendent party jurisdiction when requested?

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[1]Alvarez also raises two other issues in his Petition for Writ of Certiorari; however, these two issues (numbers 1 and 3 from Alvarez's Petition for Writ of Certiorari) are not directed toward Trans World Airlines, Inc., and, accordingly, will not be addressed herein. These are fully discussed in the Union's Brief in Opposition to Petition for Writ of Certiorari.

PARTIES

Petitioner Osvaldo Alvarez is a former employee of Trans World Airlines, Inc. ("TWA"), who was terminated by TWA for just cause as determined by the System Board of Adjustment. Alvarez was the plaintiff in the Federal District Court for the Southern District of Florida and the appellant before the Eleventh Circuit Court of Appeals.

Respondent TWA was Alvarez's employer prior to Alvarez's termination for attempting to receive two paychecks for the same pay period. TWA was a co-defendant and co-appellee below.

Respondent International Association of Machinists & Aerospace Workers District Lodge 142 (the "Union") is an employee union that represented Alvarez during the grievance process following Alvarez's termination. The Union was a co-defendant and co-appellee below.

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No. 88-984

In The

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TRANS WORLD AIRLINES, INC., and INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS DISTRICT LODGE 142,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT TWA'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Trans World Airlines, Inc. ("TWA"), Respondent herein and Appellee and Defendant in the courts below, submits this Brief in Opposition to Petition for Writ of Certiorari, in accordance with Rule 22 of this Court.[2]

JURISDICTION

Petitioner asserts jurisdiction under 28 U.S.C. § 1254 (1); however, Petitioner has made no showing that this

[2]Sup. Ct. R. 22.

Court should exercise its judicial discretion. There are here presented no important questions of "federal law" nor previously unsettled issues.

STATUTES INVOLVED

42 U.S.C. § 2000e, Title VII, Equal Employment Opportunity Act, and 45 U.S.C. § 151, *et seq.*, Railway Labor Act.

COUNTERSTATEMENT OF THE CASE

Petitioner's fourteen page "Statement of the Case" contains deceptions, misstatements, unsupported facts, and outright falsehoods. Respondent, Trans World Airlines, Inc. ("TWA"), will resist the temptation to refute each of these allegations and, instead, will simply present the *relevant* information needed by this Court to address the questions presented for review by the Petitioner.[3]

Petitioner, Osvaldo Alvarez ("Alvarez"), was an employee of TWA who was terminated for attempting to receive two checks for the same pay period. Alvarez sought the assistance of the International Association of Machinists & Aerospace Workers District Lodge 142 (the "Union") to represent him in filing a grievance against TWA pursuant to the collective bargaining agreement between TWA and the Union.

The Union represented Alvarez, a union member, throughout the grievance proceedings and, ultimately, at

[3]In order to provide a complete factual overview, TWA will also include facts pertinent to the two questions submitted by Petitioner (numbers 1 and 3) that are not addressed by TWA—questions fully addressed in the Union's Brief in Opposition.

the final arbitration hearing before the System Board of Adjustment.[4]

The System Board of Adjustment denied the grievance and found that TWA had terminated Alvarez for just cause.

Alvarez then brought the instant action against the Union and TWA, alleging (1) that the Union breached its duty to fairly represent Alvarez at the System Board of Adjustment hearing; and (2) that TWA had violated Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, by discharging Alvarez in retaliation for prior national origin discrimination claims. Alvarez also included a plethora of other counts[5] that were dismissed by the trial court, which dismissals were affirmed by the Eleventh Circuit in its *per curiam* decision of September 13, 1988, attached hereto as TWA-1.[6]

The essence of Alvarez's first claim was that the Union breached its duty to fairly represent Alvarez (a) by failing to hire an attorney to represent Alvarez before the System Board of Adjustment; and (b) by failing to introduce evidence of a decision of the Florida Unemployment Appeals Commission and arguing that its findings would necessitate a finding by the System Board of Adjustment that Alvarez was not terminated for just cause.

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[4]The System Board of Adjustment is the arbitration body responsible for final and binding arbitration as mandated by the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, which has been extended to apply to airlines and its employees by § 181, *et seq.*, Title II. *See International Association of Machinists v. Central Airlines, Inc.*, 372 U.S. 682 (1963).

[5]None of these other counts are pertinent to Alveraz's Petition for Writ of Certiorari.

[6]References to TWA's Appendix will be in the form "TWA-*n*" where *n* is the page number.

Alvarez's claim against TWA for retaliatory discharge essentially alleged that Alvarez was terminated for filing a prior claim of discrimination and/or for being a suspected FBI agent and *not* for attempting to receive two checks for one pay period.[7]

The trial court denied Motions for Summary Judgment filed by the Union and TWA and ordered a sequential trial of Alvarez's two claims: a jury trial as to Alvarez's claim against the Union, with the Court simultaneously hearing evidence as to Alvarez's claim against TWA for Title VII retaliatory discharge, and then a bench trial wherein Alvarez could introduce any additional evidence going toward his claim against TWA for retaliatory discharge.

Additionally, the trial court denied Alvarez's eleventh-hour motion to amend his Complaint to bring a state-law claim of negligence against his bank.[8]

After the conclusion of the jury trial as to the breach of duty by the Union to fairly represent Alvarez before the System Board of Adjustment, the district court directed a verdict for the Union and TWA[9] and proceeded to hear additional evidence as to the Title VII claim. After additional evidence was presented by Alvarez, the district

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[7]Alvarez argued that TWA fabricated the circumstances leading up to the "discovery" that Alvarez had received two pay checks for one pay period as an excuse for terminating Alvarez.

[8]Alvarez sought to add his bank as a party defendant to this action and to add a claim for negligence against that bank. Alvarez contends that the district court erred by not exercising pendent party jurisdiction over this wholly state law claim between non-diverse parties.

[9]TWA was a nominal party to this first trial inasmuch as the relief sought by Alvarez—reinstatement—required that TWA be a party in the event Alvarez succeeded in proving that the Union had breached its duty to fairly represent Alvarez.

court then granted TWA's Rule 41(b) motion for involuntary dismissal of Alvarez's Title VII claim and entered formal findings of fact and conclusions of law.

Alvarez appealed to the Eleventh Circuit which heard oral argument and then issued a *per curiam* decision affirming the district court's decision in all respects. *See* TWA-1. This Writ for Certiorari followed.

SUMMARY OF THE ARGUMENT

The Petitioner has raised five issues that he contends merit this Court granting a Writ of Certiorari.

None of Petitioner's issues present any important federal question. Of the three questions addressed by Respondent, Trans World Airlines, Inc., all are patently frivolous. Petitioner is simply seeking yet another redetermination of the propriety of the decisions of the trial court.

It is not an important federal question whether a denial of a Motion for Summary Judgment precludes the granting of a later Motion for Directed Verdict by the same party. Additionally, contrary to Petitioner's contention, this Court has never held otherwise.

Moreover, Rule 39(c), Federal Rules of Civil Procedure, is clearly a discretionary measure: a trial court "*may* try any issue with an advisory jury." The Rule does not mandate trial by jury simply because it was requested. This is not an important or unsettled federal question.

Finally, Petitioner's contention that this Court should decide, within the context of this case, whether pendent

party jurisdiction is appropriate is completely without merit. Again, no important federal question has been presented.

In the absence of any important or unsettled federal question (or conflict of law), there is no reason for this Court to review the merits of this case—it has been fully tried before the district court and affirmed, after argument, by the Eleventh Circuit.

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ARGUMENT

Petitioner has raised five issues in support of granting his Petition for Writ of Certiorari. Petitioner argues that the issues raised are important issues of federal law unresolved by this Court or, alternatively, were decided contrary to prior decisions of this Court.[10] Each of these issues is completely devoid of merit.[11]

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[10]The Eleventh Circuit's affirmance was *per curiam,* without opinion.

[11]TWA shall not address the argument of whether the Union breached its duty to fairly represent Alvarez by not providing him with an attorney inasmuch as this issue is fully addressed in the Union's Brief in Opposition and any such discussion herein would be repetitive. Moreover, the argument of Petitioner that the Union breached its duty to fairly represent Alvarez by not arguing issue preclusion before the System Board of Adjustment is fully addressed in the Union's Brief in Opposition. It should be noted, however, that the trial court's scope of review was

(Continued on following page)

A. No Rule Of Law Requires A Trial Court To Deny A Motion For Directed Verdict Simply Because It Previously Denied A Motion For Summary Judgment.

Petitioner, for the first time, now claims that the decision of the trial court denying Defendants' Motions for Summary Judgment precluded a later directed verdict for the Defendants since the same standard applies to both.[12]

Petitioner contends that the trial court's order directing a verdict for the Defendants after previously denying Defendants' Motions for Summary Judgment was "contrary to applicable decisions of this Court."

Absolutely no rule of court precludes a trial court from granting a motion for directed verdict merely because the trial court previously denied motions for summary judgment. Indeed, it was exactly the practice of denying

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(Continued from previous page)

legally limited to whether the failure to introduce the prior decision of the Unemployment Appeals Commission and *argue* issue preclusion before the System Board of Adjustment was a breach of the Union's duty to fairly represent Alvarez. Without making a determination of whether issue preclusion applies to such a situation, the trial court found that the Union had not breached its duty to Alvarez by not making this argument before the System Board of Adjustment.

[12]This issue has not been preserved on appeal and, accordingly, this Court should not address this issue. Petitioner argued before the Eleventh Circuit that the Directed Verdict was improper because (a) the Union was unprepared and unable to represent Alvarez fairly; (b) the Union failed to provide Alvarez assistance of counsel; and (c) the Union failed to argue and the court failed to apply the doctrine of issue preclusion. Nowhere did Petitioner argue that the denial of Defendants' Motions for Summary Judgment had a preclusive effect over a later Motion for Directed Verdict.

motions for summary that led to this Court's watershed cases of *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S. Ct. 2548 (1986), and *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S. Ct. 2505 (1986).

In *Anderson v. Liberty Lobby,* this Court held that the standard for granting a motion for summary judgment is the same as that for granting a motion for directed verdict:

> The petitioners suggest, and we agree, that this standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict.

Anderson v. Liberty Lobby, Inc., 106 S. Ct. at 2511.

Petitioner's contention that the denial of a Motion for Summary Judgment mandates denial of a later Motion for Directed Verdict contains a fatal assumption: that a trial court will never deny a motion for summary judgment when it should be granted.

It was precisely this problem that led to the decisions in *Celotex* and *Liberty Lobby.* Indeed, the trial court stated that it had denied the Motions for Summary Judgment because Defendants' "have a judge who does not believe in summary judgment." TWA-3.

More importantly, once the Court determined that it could have granted Defendants' Motions for Summary Judgment (had the Defendants had a judge who "believed" in summary judgment), it certainly had the authority to direct a verdict at the close of all the evidence.

Notwithstanding Petitioner's position to the contrary, the trial court's decision is not in conflict with a previous decision of this Court. Moreover, since the Court has already spoken to this issue extensively in *Celotex* and *Liberty Lobby*, there is no need for this Court to readdress it in the context of this case.

B. The Trial Court Was Not Under Any Obligation To Use An Advisory Jury Under Rule 39(c) As To Alvarez's Title VII Claim Against TWA.

Initially, it should be noted that Petitioner did not assign error to the trial court's decision to sequentially try Alvarez's claims, jury and non-jury, and, accordingly, this issue has not been preserved for appeal.[13]

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[13]While Petitioner *requested* that the entire case be heard before a jury, the trial court correctly determined that no right to a jury trial existed as to Alvarez's Title VII claim. *Lehman v. Nakshian,* 453 U.S. 156, 164 (1981). Petitioner did not object to the sequential trial arrangement and admitted that the trial court had the authority to hear the case in that manner:

> As far as how you are going to do the trial, that is up to your discretion. That is pretty clear except for the possibility that Mr. Alvarez is deprived of his right to a jury trial. Any way that you organize the case around this Title [VII] count is up to your discretion. If you want to bifurcate it, I think you would be within your discretion to do that.

TWA-5, *quoting* counsel for Alvarez immediately prior to trial when the district court suggested a sequential trial.

Indeed, it has now been determined that there is no right to a jury trial on a breach of duty of fair representation claim. *Leach v. Pan American World Airways,* 842 F.2d 285 (11th Cir. 1988).

Furthermore, no rule of court requires or suggests that the advisory jury option available under Federal Rule of Civil Procedure 39(c) is anything but discretionary. The trial court heard evidence during Alvarez's presentation of his case before the jury on his claim against the Union and then during the subsequent bench trial on Petitioner's Title VII claim. Alvarez apparently suggests that the trial court was incapable of following Alvarez's argument and that the procedure used by the trial court—and acceded to by Alvarez at the time—"deprived Alvarez of the right to a fair trial." This is an impertinent supposition and is hardly an "important question of federal law" requiring this Court's attention.

C. The Trial Court Had No Obligation To Exercise Pendent Party Jurisdiction.

Finally, Alvarez seeks to invoke this Court's discretionary jurisdiction because Alvarez says the United States Supreme Court has never approved the doctrine of pendent party jurisdiction.[14]

Alvarez suggests that the question is "Did the district court err in this case by failing to exercise pendent party jurisdiction?" This should be more accurately stated as follows: "Must a federal district court exercise pendent party jurisdiction when requested?"

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[14]Indeed, this Court appears to disfavor the doctrine of pendent party jurisdiction. *See Aldinger v. Howard*, 427 U.S. 1, 14-15 (1976).

The answer to both these questions is, of course, a resounding "no." Even pendent jurisdiction[15] has been consistently found to be discretionary:

> That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right.

United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966). The Eleventh Circuit has held that this same standard applies to pendent *party* jurisdiction:

> The exericse of pendent party jurisdiction is a *discretionary* decision reserved for the district court.

Lykins v. Pointer, Inc., 725 F.2d 645, 649 (11th Cir. 1984) (emphasis in original; brackets omitted).

Petitioner argues that the trial court failed to apply the "applicable test" in deciding whether to assert pendent party jurisdiction. In affirming the district court's decision, the Eleventh Circuit rejected this suggestion. Petitioner apparently hopes this Court will re-review this decision and find otherwise; however, such second-guessing of the Eleventh Circuit is hardly appropriate at this juncture.

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[15]Pendent jurisdiction involves the addition of state law claims to an otherwise federal case; whereas, pendent *party* jurisdiction necessitates adding additional defendants as well.

CONCLUSION

Petitioner has not shown even one reason why this Court shold review the Eleventh Circuit's *per curiam* affirmance of the district court's judgments. The conflict of decisions between circuits or important questions of federal law necessary to merit this Court's attention are not present in this matter.

"A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." Sup. Ct. R. 17. This is not such a case. The decision of the Eleventh Circuit Court of Appeals was fully consistent with established legal principals.

Respectfully submitted,

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Dated: January 10, 1989

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-5379

D.C. Docket No. 85-53

OSVALDO ALVAREZ,

Plaintiff-Appellant,

versus

TRANS WORLD AIRLINES, INC. and
INTERNATIONAL ASSOCIATION OF MACHINISTS &
AEROSPACE WORKERS DISTRICT LODGE 142,

Defendants-Appellees.

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Appeal from the United States
District Court for the Southern
District of Florida

———o———

(September 13, 1988)

Before KRAVITCH and EDMONDSON, Circuit Judges, and Hoffman,* Senior District Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

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*Honorable Walter E. Hoffman, Senior U. S. District Judge for the Eastern District of Virginia, sitting by designation.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

OSVALDO ALVAREZ, Plaintiff,	)	No. 85-0053-Civ-KEHOE
vs.	)	Miami, Florida
TRANS WORLD AIRLINES, Defendants.	)	February 4, 1987

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE JAMES W. KEHOE
and a jury

APPEARANCES:

For the Plaintiff:	BRET CLARK, ESQ.
For the Defendant TWA:	SHERRYLL DUNAJ, ESQ.
For the Defendant IAAM:	MICHAEL GORDON, ESQ. and GEORGE TUCKER, ESQ.
Court Reporter:	PAUL HAFERLING 301 North Miami Avenue Miami, Florida 33128

* * *

MR. TUCKER: I would like to make a rule [50] motion to get rid of the case right now.

I don't know where to begin. I am sure you don't want to hear old war stories. I have been doing this for about 20 years now. I do 7 or 8 of these cases a year. The first one I did to a jury trial to my recollection. It is the

second case that has been tried. They are all disposed of on summery judgement [sic] motions, because—

THE COURT: Your problem is you have a judge who does not believe in summary judgement [sic].

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

OSVALDO ALVAREZ, Plaintiff,	)	
	)	NO. 85-0053-Civ-
vs.	)	KEHOE
	)	
TRANS WORLD AIRLINES, Defendants.	)	Miami, Florida
	)	February 2, 1987
	)	9:00 A.M.
	)	

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE JAMES W. KEHOE
and a jury

APPEARANCES:

For the Plaintiff:	BRET CLARK, ESQ.
For the Defendants Trans World Airlines:	SHERRYLL DUNAJ, ESQ.
IAAM:	MICHAEL GORDON, ESQ. and GEORGE TUCKER, ESQ.
REPORTED BY:	PAUL HAFERLING 301 North Miami Avenue Miami, Florida 33128

* * *

MR. CLARK: It seems to me—we papered over this question and the motions we filed with the Court and Your Honor has considered all those authorities and you made your decision. I can't say that I agree with all that you said but I am willing, subject to reserving my right to bring it up at a later time, to live with whatever Your Honor says.

I think you already made it plain. I think basically we are all in agreement on the basic contours of the action.

This thing about, can we relitigate what happened at the arbitration hearing, that is a crucial question here because did Mr. Alvarez—we will have to talk all around the issue. If we are going to try to ignore that and say that the arbitration opinion is final and binding and we can't relitigate that. Because if that were true, all this about breach of duty of fair representation would not be worth anything because that is the whole point of a breach of duty of fair representation.

If you have the union and the company and they get together and they say, let's get together, let's fix this arbitration hearing, we'll let Mr. Alvarez lose, then there is no way he can bring his case into Federal Court. And that is exactly what they're arguing over there and that's exactly why the courts had implied this cause of action for breach of duty of fair representation. We can't allow that to happen.

As far as how you are going to do the trial, that is up to your discretion. That is pretty clear except for the possibility that Mr. Alvarez is deprived of his right to a jury trial. Any way that you organize the case around this Title 7 count is up to your discretion. If you want to bifurcate it, I think you would be within your discretion to do that.

* * *